IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 3, 2006 Session

GLOBE AMERICAN CASUALTY CO. v. THE HEUER INSURANCE AGENCY, INC.

Appeal from the Circuit Court for Monroe County
No. V03144P Lawrence H. Puckett, Judge

No. E2005-01805-COA-R3-CV - FILED JULY 5, 2006

Globe American Casualty Company ("Globe") filed suit against The Heuer Insurance Agency, Inc. ("the insurance agency"), seeking indemnification for claims purportedly paid under a policy of automobile insurance issued to Danny Hodge ("the insured"). Following a bench trial, the court held that the insurance agency, in handling the insured's application for insurance, negligently supplied inaccurate information to Globe, which resulted in Globe issuing a policy of insurance to the insured and thereby ultimately incurring a loss of approximately $75,000. The court ordered the insurance agency to indemnify Globe for its loss. The insurance agency appeals, arguing that Globe's payment to the insured was voluntary, thus barring Globe's right to seek indemnification. We reverse and dismiss.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Complaint Dismissed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Michael R. Campbell, Chattanooga, Tennessee, for the appellant, The Heuer Insurance Agency, Inc.

Thomas L.N. Knight, Chattanooga, Tennessee, for the appellee, Globe American Casualty Co.

OPINION

I.

The insured is a roofer by trade. He operates his own roofing business. In January, 2000, he attempted to secure a loan from a local lender. He wanted to use as collateral his 1990 GMC Model 3500 pickup truck. This truck was a "dually," meaning it had two wheels on the front axle and four wheels on the back axle. While the insured owned several other vehicles, most all of them had mechanical problems. It appears from the record that the truck was his primary means of

transportation. As a prerequisite to granting the loan, the lender required the insured to obtain insurance on his truck. The plaintiff testified at trial that, prior to securing the policy of insurance involved in this case, he had never insured any of his vehicles.

On January 11, 2000, the insured went to the insurance agency to obtain a quote for automobile insurance. He spoke with an agent, Jamie Allison, who took some information from the insured and filled out an "Auto Quote Sheet." On this form, Ms. Allison noted that the insured drove a 1990 GMC 3500 pickup and indicated that the truck was a "*dooley*." (Emphasis added). The following day, the insured returned to the insurance agency for the purpose of actually applying for insurance coverage for his vehicle. The insured parked his truck across the street from the insurance agency in the parking lot of a funeral home. In filling out the insurance application, Ms. Allison asked the insured several questions about the truck. She did not inquire as to the number of wheels on the truck. There was no question on the application pertaining to this specific information. While Ms. Allison indicated on the application that she had inspected the truck, she testified at trial that she had simply viewed the truck through her office window. She further testified that "[i]t was facing our office and I looked out."

Under the section of the application titled "Occupation," Ms. Allison wrote that the insured was a self-employed roofer. Ms. Allison then asked the insured if he used the truck in his business. At trial, the insured testified that he answered Ms. Allison's question by stating that he "didn't use it every day but some days [he] did drive it to work." Ms. Allison testified, however, that the insured told her he did not use the truck in his business, but rather that "he had a van that he used in his roofing business." Ms. Allison checked "no" under the box marked "business use." Once the application was completed, Ms. Allison presented it to the insured for his signature. The application was signed by the insured and dated January 12, 2000.

When it received the application, Globe issued a policy of insurance to the insured, providing coverage for the truck from January 12, 2000, through July 12, 2000. At the time the policy was issued, Globe insured only private passenger automobiles; it did not write commercial policies. If an application indicated that the subject vehicle was used for business, Globe might still issue the policy, provided the business use was classified as artisan, *i.e.*, the individual is self-employed and uses the vehicle "in the performance of [his or her] job." Globe's underwriting rules listed examples of artisan use as "plumbers, carpenters, electricians, etc." If a use was properly classified as artisan, Globe would issue the policy, but it would require a surcharge of 15%. However, and significantly, Globe's underwriting rules specifically provided that "vehicles with more . . . than 4 wheels" were ineligible for coverage.

On May 31, 2000, during the term of the policy, the insured was involved in a serious traffic accident, in which his truck struck the rear of another vehicle. The insured had worked that day and was on his way home, pulling a 16-foot work trailer loaded with ladders, walkboards, and work tools. The insured would testify at trial that he was driving the truck that day because all of his other vehicles were inoperable. The accident resulted in serious personal injuries or death to the occupants of the other vehicle. Various claims were made under the insured's policy with Globe.

Globe was notified of the insured's accident on June 12, 2000. On June 21, 2000, Globe's in-house counsel sent a memorandum to the adjusters handling the accident. The memorandum advised that Globe had two options with respect to the potential claims: first, accept liability and then seek indemnification from the insurance agency, or, second, deny the claims on the basis of the "business use" misrepresentation and either wait for litigation to ensue or seek a declaratory judgment. With respect to the first option, the memorandum indicated that Globe could seek indemnity from the insurance agency on the basis that Globe does not insure "these types of vehicles," *i.e.*, vehicles with more than four wheels. Counsel noted, however, that the insurance agency might "claim we were a volunteer because we could have denied the claim based on the 'business use' misrep[resentation]." As to the second option, counsel advised that Globe could proceed under the theory that the insurance agency breached a duty owed to Globe to inform it of the business use of the vehicle, and opined that the more-than-four-wheels argument "would seem like a slam dunk (famous last words)."[1] Ultimately, counsel recommended that Globe deny coverage, but acknowledged that a denial might be premature pending an investigation of whether the insured was using the truck in his business at the time he signed the application and what Ms. Allison had to say about (1) the issue of business use and (2) the fact that the truck was a "dually."

Following an investigation, Globe concluded that the insured did not *intend* to deceive the insurance agency when he indicated he did not use the truck for business purposes. Accordingly, Globe did not believe it could prevail in a declaratory judgment action, so it decided to accept liability and pay the pending claims. Globe paid $69,084.43 to settle the claims, and an additional $5,221.22 in expenses related to the case, for a total of $74,305.65.

On May 29, 2003, Globe filed a complaint against the insurance agency. As pertinent to the issues on this appeal, the essence of the complaint against the insurance agency is encapsulated in the following allegations:

> The defendant's agent knew or should have known that the plaintiff's underwriting requirements made the [insured's] vehicle ineligible for coverage, but nonetheless the application taken by the defendant from [the insured] was submitted to the plaintiff without informing it that the vehicle had more than four (4) wheels so that in reliance on the application plaintiff issued a policy of automobile liability insurance coverage to [the insured].
>
> * * *
>
> Said amounts were paid by the plaintiff [as a result of the accident] pursuant to a policy which would not have been issued to [the insured] but for the negligence of the defendant's agent who failed to adhere to and follow plaintiff's underwriting requirements.

[1] The words "famous last words" were a part of the memorandum.

The complaint goes on to allege that "the negligence and breach of contract" of the insurance agency was the "sole and proximate cause" of Globe's loss.

The insurance agency filed an answer to Globe's complaint in which it controverted all of the general charges of legal culpability. As particularly pertinent to the issues before us, the insurance agency responded thusly:

> [The defendant] admits that plaintiff made payments under its policy but denies that plaintiff was required to do so.
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> * * *
>
> [The defendant] denies that the plaintiff sustained any damages by reason of breach of contract on the part of [the defendant] in failing to follow plaintiff's underwriting guidelines. [The insured] made a misrepresentation in his application for coverage as a result of which the plaintiff was entitled to void the [insured's] policy from its inception. [The defendant] denies its liability to the plaintiff for payments made under the [insured's] policy which the plaintiff was not required to make.

(Numbering of paragraphs omitted).

Following a bench trial, the court entered its memorandum opinion and order, in which it found in favor of Globe and awarded it a judgment of $69,084.43, plus prejudgment interest of 5%, and $5,221.22 in expenses. The insurance agency appeals.

II.

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court fails to make a finding of fact on a material matter, there is nothing in the record "upon which the presumption of correctness contained in Tenn. R. App. P. 13(d) can attach." ***Kelly v. Kelly***, 679 S.W.2d 458, 460 (Tenn. Ct. App. 1984). In the absence of such a finding, we must determine, based upon the record before us, where the preponderance of the evidence lies. ***Crabtree v. Crabtree***, 16 S.W.3d 356, 360 (Tenn. 2000); *see also* ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997).

Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

III.

In awarding Globe "$69,084.43 for amounts [it] paid on the claims plus prejudgment interest of 5% per annum thereon and $5,221.22 in expenses incurred in handling the claims," the trial court filed its memorandum and order which, in its entirety, states as follows:

> The court is deciding the issues in this case based on the law of indemnity laid down by our Eastern Section Court of Appeals in the case of Farmers Mutual of Tennessee v. Athens Insurance Agency et al. 145 S.W.3d 566 (2004). The principles enunciated by Judge Franks in that opinion which apply here are:
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> 1. "Indemnification can result from an express contract between the parties or an obligation to indemnify can 'arise by implication from the relationship of the parties.' Houseboating Corp. of America v. Marshall, 553 S.W.2d 588 (Tenn. 1977)." Farmers Mutual at 568.
>
> Because of the party's [sic] relationship, an obligation upon the Huer [sic] Insurance Group to indemnify Globe American Casualty Co. arose by implication.
>
> 2. "An insurance agent who fails to make a full disclosure of all matters concerning the risks and hazards of a prospective insurable interest, or to report the issuance of a policy as directed in his contract of agency, may incur liability to the insurer for exposing the insurer to liability for claims of loss under policies where such claims naturally result from the agent's wrongful conduct." Ibid.
>
> The Huer [sic] Insurance Group failed to make a full disclosure of all matters concerning the risks and hazards of insuring Mr. Hodge's truck in two respects (1) the agent failed to report the vehicle was a "dually" and (2) the agent failed to report to Globe American Mr. Hodges [sic] business use of the vehicle. The first failure is solely due to the agent's neglect. The second failure to report accurately allegedly was due to Hodge's misrepresentation to the agent which the defendant agent claims provided Globe a defense which would have voided the policy and prevented Globe American's loss incurred from payment on liability claims arising under the policy.
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> 3. "It must be proved [by Globe American Casualty Co.], however, that the agent's conduct was the proximate cause of the loss to the insurer, and where the insurer was not prejudiced by the failure to

report the policy issuance or to fully assess the risk involved, and would have done nothing differently or incurred no greater loss with or without such knowledge, the agent may escape liability for his [her] wrongful conduct." Ibid.

The court finds that the agent's conduct in failing to accurately report that the policy application was for a "dually" was the proximate cause of the wrongful issuance of the policy by Globe American Ins. Co.

The courts finds that the uncontradicted evidence in the trial is that Globe American would not have issued the policy on a "dually" and that such vehicles increased the risk of loss for the insurer so that the insurer both incurred a greater loss and a greater risk of loss than its contract with the agent allowed the agent to incur on the insurer's behalf.

4. "There can be no recovery where there was concurrent negligence on both indemnitor and indemnitee." Ibid., 569.

The court finds that Globe American committed no act of negligence in issuing the policy. The insurer's conduct contributed in no degree "to the [wrongful] issuance of the policy."

The agent's failure to note that the vehicle was a "dually" exposed the insurer to the claimed misrepresentation of Mr. Hodge which may relieve the agent from liability for her error in misreporting the type of vehicle insured.

Globe American's payment of the liability claims arising under the policy falls under another principle of law cited by Judge Franks and contained in Ryder Truck Lines Inc. v. Emehser.[sic], 1985 Tenn. App. LEXIS 3438 that:

> A party seeking indemnification under the common law for settlement costs much prove that its payment was not made voluntarily or gratuitously but rather because of or by virtue of its actual liability.

Under this principle, Globe American must "establish . . . [the insurer's] case against the indemnitor [Heuer [sic] Insurance Group] in the same way that the claimant [Hodge] . . . would have been obligated to do" in an action against Globe American, that is, "by a preponderance of the evidence." Ibid., 10 and 11. Obviously,

> because Hodge admitted at the trial that he sometimes used the truck in his business, and he was so using it at the time of the accident, these facts support the agent's claim of misrepresentation at the time of the application. However, the court finds that the limited use of the truck in Hodge's business to which he testified was not such that Globe American would have refused to issue the policy, rather the company often accepted such risks and, upon acceptance of the business risk as occurred here, the insurer accepted the risk of the truck's business use and assessed Mr. Hodge an added premium commensurate with the risk. In doing so, Globe American did not thereby waive its right to indemnification from the agent for losses proximately caused by the agent's error in failing to advise the insurer that the vehicle was a "dually." The claim that the agent "would not have submitted Hodge's application to Globe American, and, therefore, the policy would never have been issued" if Hodge's business use had been stated by Mr. Hodge is not supported by the evidence. The agent properly could have submitted an application on a business use vehicle to Globe American on behalf of Mr. Hodge because the company wrote such coverage for artisans such as Mr. Hodge. The court concludes that if the agent chose not to do so for Mr. Hodge, the agent would be turning down good business which it was authorized by Globe American to undertake on its behalf and that Globe American was willing to undertake on Mr. Hodge's application but for the fact that the vehicle involved was a "dually." The court is unable to conclude from all the proof that the failure to note the business use of the vehicle on the application was the result of misrepresentation to the agent by Mr. Hodge. Rather the fault is shared by both the agent and by the applicant on this inaccurate and incomplete application. . . .

(Underlining in original).

IV.

While the insurance agency states five issues, its position with respect to the trial court's judgment can be "boiled" down to two basic arguments. First, it contends that it was not guilty of a breach of contract or an act or omission of common law negligence in handling, and submitting to Globe, the insured's application for insurance. Second, it argues that, regardless of whether it was legally culpable with respect to its handling and submission of the insured's application, Globe is not entitled to indemnification because, according to the insurance agency, Globe was not legally obligated to pay the claims made against the insured arising out of the subject accident, which payments form the basis of Globe's claim for indemnification against the insurance agency.

V.

The trial court held, as a matter of law, that the relationship between the insurance agency and Globe potentially created in Globe a right of indemnification by implication. The trial court relied on our decision in the case of ***Farmers Mut. of Tenn. v. Athens Ins. Agency***, 145 S.W.3d 566, 568 (Tenn. Ct. App. 2004) for this holding . We agree with the trial court's legal conclusion.

In ***Farmers***, we quoted, with approval, the following language from Am. Jur.:

> An insurance agent who fails to make a full disclosure of all matters concerning the risks and hazards of a prospective insurable interest, or to report the issuance of a policy as directed in his contract of agency, may incur liability to the insurer for exposing the insurer to liability for claims of loss under policies, where such claims naturally result from the agent's wrongful conduct.

Id., quoting from 43 Am.Jur.2d Insurance § 135, p. 218.

In the instant case, the trial court found, as a fact, that the insurance agency was guilty of failing to report to Globe that the vehicle for which the insured sought coverage was a "dually," *i.e.*, a vehicle with more than four wheels. The evidence does not preponderate against this factual finding. *See* Tenn. R. App. P. 13(d).

It is clear from the record that the insured attempted to correctly express to the defendant's agent the type of vehicle for which coverage was being sought. The agent heard the insured use the word "dually" but, apparently not knowing what it meant, wrote the word "dooley" on the "Auto Quote Sheet." While the agent may not have known what a "dooley" was, she had to know that this word was descriptive – at least in the mind of the insured – of the type of vehicle owned by him. Despite this knowledge, she failed to write either "dually" or "dooley" on the application when she filled in the type of vehicle. There is no logical reason why she failed to do so. She knew the insured desired insurance on a "dually" or "dooley"; she should have so indicated on the application.

The record is also clear that the company's underwriting requirements included a prohibition against insuring vehicles with more than four wheels. By definition, a "dually" or, misspelled, a "dooley," has more than four wheels. Even had the application contained the misspelled word "dooley," there is every reason to believe that when Globe saw the word – and pronounced it – it would have realized that the vehicle was a dually and did not qualify for coverage. This being the case, it is logical to assume that the company would have declined the application and not issued the policy.

The defendant's agent knew or should have known that Globe did not insure vehicles with more than four wheels. Since she did not know what type of vehicle was being described to her by the term "dooley," she could not have known whether it qualified for coverage or not. While it is

true that the underwriting manual available to the agent did not require her to personally inspect the vehicle, she knew where the vehicle was and was negligent in not inspecting it in view of her lack of familiarity with the term used by the insured.

We hold that the insurance agency was guilty of common law negligence in failing to fully show on the application the type of vehicle for which insurance was being sought.

VI.

A.

Having concluded that the insurance agency was negligent in the handling and submission of the insured's application to Globe, we must next determine whether Globe has a claim for indemnification against the defendant.

The answer filed by the insurance agency denied that Globe was legally required to pay the claims asserted against the insured. This denial placed the burden on Globe to prove by a preponderance of the evidence that it was legally obligated to pay the subject claims. As we noted in ***Ryder Truck Lines, Inc. v. Emenhiser***, 1985 WL 4908, at *4 (Tenn. Ct. App. M.S., filed December 31, 1985), an indemnitee must prove "that its payment [on behalf of its insured] was not made voluntarily or gratuitously but rather because of or by virtue of its actual liability." The insurance agency contends that Globe failed to establish this prerequisite to recovery under a theory of indemnification. In fact, the insurance agency contends that the evidence preponderates that Globe had a defense against the insured's claim of liability under the policy and that, despite this defense, Globe embraced liability under the policy. Thus, the insurance agency contends, the payment by Globe, instead of being made "by virtue of its actual liability," was made "voluntarily or gratuitously," and that this fact bars Globe's suit for indemnification against the insurance agency.

The insurance agency contends that the insured misrepresented his use of the subject vehicle in that he failed to reveal to the agent that, at the time he applied for insurance, the vehicle described in the application was his preferred means of transportation for use in his roofing business.

The trial court does not appear to have made a definitive finding of fact regarding the insurance agency's claim that the insured misrepresented his use of the vehicle. The court made a number of statements in which it alluded obliquely to the defendant's claim:

> The second failure to report accurately [by the insurance agency] *allegedly* was due to [the insured's] misrepresentation to the agent . . .
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> * * *
>
> the *claimed* misrepresentation of [the insured] . . .

* * *

> these facts support the agent's claim of misrepresentation . . .

* * *

> The court is unable to conclude from all the proof that the failure to note the business use of the vehicle on the application was the result of misrepresentation to the agent by Mr. Hodge. Rather the fault is shared by both the agent and by the applicant on this inaccurate and incomplete application. . . .

(Emphasis added). Since the trial court does not appear to have made an explicit and clear finding as to the preponderance of the evidence on the defendant's claim of a misrepresentation by the insured, we must review the evidence to determine where the preponderance of the evidence lies. *See* ***Crabtree***, 16 S.W.3d at 360. In any event, we have determined that the insured made a misrepresentation to the defendant's agent regarding whether the subject vehicle was used by him in his business.

B.

Tenn. Code Ann. § 56-7-103 (2000) provides as follows:

> No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented *increases the risk of loss*.

(Emphasis added). Accordingly, for Globe to void the insured's policy, it must first prove that the insured made a false statement on the insurance application. ***Id.***; ***Spellmeyer v. Tenn. Farmers Mut. Ins. Co.***, 879 S.W.2d 843, 845-46 (Tenn. Ct. App. 1993) (quoting ***Womack v. Blue Cross & Blue Shield of Tenn.***, 593 S.W.2d 294, 295 (Tenn. 1980)). Once Globe has shown that a misrepresentation was made, it must then prove *either* (1) that the insured actually intended to deceive Globe with the misrepresentation, *or* (2) that the misrepresentation increased the risk of loss to Globe. Tenn. Code Ann. § 56-7-103; ***Spellmeyer***, 879 S.W.2d at 846. While a determination of whether a misrepresentation has been made is a question of fact, the issue of whether that misrepresentation increased the risk of loss to the insurer presents a question of law. ***Spellmeyer***, 879 S.W.2d at 846.

Turning to the instant case, the evidence preponderates that the insured misrepresented his use of the truck in his application for insurance. Not only was he driving the truck home from work

on the day of the accident, but the truck was his only operable vehicle at the time of the accident. More significantly, it appears from the record that the truck was, as a practical matter, the insured's only operable vehicle and certainly his preferred method of transportation when he took out the policy of insurance, some five and one-half months prior to the accident. The state trooper who investigated the accident testified at trial that the insured told him that he "had been driving [the truck] for a period of time," and that the insured's choice to drive the truck on the date of the accident "was not a one-time deal." When the evidence on the issue of whether the insured was using the subject vehicle in his business at the time he signed his application for insurance is evaluated, on balance it preponderates in favor of a finding that the subject vehicle was being used in a business.

Having found that the evidence preponderates in favor of a finding that the insured misrepresented his use of the vehicle, we must next determine whether he made the misrepresentation "with actual intent to deceive," or if the misrepresentation "increase[d] the risk of loss." Globe did not believe there was sufficient evidence to prove that the insured "inten[ded] to deceive" the insurance agency when he indicated his very limited use of his truck in his roofing business. However, Globe was legally entitled to void the policy if the insured's misrepresentation increased the risk of loss to the company regardless of whether he "intentionally" misrepresented his use of the vehicle. "A misrepresentation increases the risk of loss when it is of such importance that it 'naturally and reasonably influences the judgment of the insuror in making the contract.'" ***Sine v. Tenn. Farmers Mut. Ins. Co.***, 861 S.W.2d 838, 839 (Tenn. Ct. App. 1993) (quoting ***Seaton v. Nat. Grange Mut. Ins. Co.***, 732 S.W.2d 288, 288-89 (Tenn. Ct. App. 1987); ***Loyd v. Farmers Mut. Fire Ins. Co.***, 838 S.W.2d 542, 545 (Tenn. Ct. App. 1992). As stated in ***Loyd***, "[i]t is not necessary to find that the policy would not have been issued if the truth had been disclosed. It is sufficient that the insurer was denied information which it sought in good faith and which was deemed necessary to an honest appraisal of insurability." ***Id.***, 838 S.W.2d at 545 (citation omitted).

In the case at bar, there is ample evidence in the record indicating that the business use of the vehicle "increased the risk of loss" to Globe. The mere fact that Globe imposes a 15% surcharge on "artisan use" of a vehicle is indicative that the use of a subject vehicle for business purposes increased the chance of Globe incurring a loss. Darrin Leiviska, product manager for Globe at the time of the insured's accident, admitted at trial that "business or artisan use of a vehicle materially increases the risk of loss to Globe." Likewise, Kenneth Leiner, assistant claim manager for Globe in May, 2000, acknowledged that the imposition of an increased insurance premium for artisan use "indicated that it materially affected Globe's risk of loss." Clearly, the issue of business use of a vehicle is a factor which influences Globe's judgment in issuing and pricing an insurance contract, *see* ***Sine***, 861 S.W.2d at 839, and such information was necessary to Globe for "an honest appraisal of insurability." ***Loyd***, 838 S.W.2d at 545. The insured's misrepresentation of his business use of the truck increased Globe's risk of loss. Furthermore, the trial court erred when it determined that the insured's misrepresentation was insufficient for Globe to void the policy unless Globe could show that it would not have issued the policy if it had been aware of the insured's business use. Such a showing is unnecessary. It is enough to show that the insurer "was denied information which it sought in good faith and which was deemed necessary to an honest appraisal of insurability." ***Id.***

As early as June 21, 2000 – just nine days after learning of the insured's accident – Globe was advised by in-house counsel that the insurance agency might "claim we were a volunteer because we could have denied the claim based on the 'business use' misrep[resentation]." Counsel concluded the memorandum by opining that "a denial of coverage is appropriate," provided Globe conducted an appropriate investigation. While Globe's subsequent investigation revealed that the insured had indeed been using the truck in his business, assistant claim manager Leiner determined that this misrepresentation was not made with an intent to deceive, and on that basis, Leiner decided to honor the insured's coverage. However, Leiner testified at trial that he was unaware that, under Tennessee law, Globe had the option to deny coverage when a misrepresentation increases the company's risk of loss, regardless of whether the applicant intended to deceive. This ignorance of the law caused Globe to make a critical mistake: it honored the insured's policy when, under the law, it was entitled to void it. Thus, because, as previously determined, the insured's misrepresentation increased Globe's risk of loss, the evidence preponderates in favor of a finding that Globe's decision to honor the policy was entirely voluntary, and was not made "by virtue of its actual liability." ***Ryder Truck Lines***, 1985 WL 4908, at *4. As such, the trial court erred in finding that Globe is entitled to be indemnified by the insurance agency.

VII.

The judgment of the trial court is reversed, and the complaint against the insurance agency is dismissed. Costs on appeal and at the trial court level are taxed to the appellee, Globe American Casualty Co.

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CHARLES D. SUSANO, JR., JUDGE